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AUTHOR Mudd, John O.
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ABSTRACT

A number of changes have been made in student assessment at the University of Montana School of Law, in an attempt to assess elements of student performance as well as knowledge level. Within the educational goal of blending legal theory and practical skills, practicing lawyers were surveyed about what a good lawyer should be able to do and should know. This information has been incorporated into the school's curriculum. The importance of attorneys' and law students' abilities to assess their own and each others' abilities is noted. The school has, therefore, encouraged the development of assessment skills in its students. Over 100 outside assessors are routinely used in the assessment of law students. The assessors, who include both paid employees and volunteers, are thoroughly trained. An acceptable measure of interrater reliability has been established. The assessment center, which is available to the faculty as one option for evaluating students, now coordinates the performance assessment of 225 students. The written assessments complement traditional grades. Videotapes of students' oral presentations are also maintained. Sample documents which are used to assess student performance in a multidimensional trial exercise are appended. Guidelines for the evaluators and a sample evaluation form are included. (GDC)

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Assessment for Learning in Law

John O. Mudd
Dean, School of Law
University of Montana
Missoula, Montana 59812
(406) 243-4311

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Assessment for Learning in Law

John O. Mudd

Abstract

In this paper I describe changes in the assessment of students at the University of Montana School of Law. The changes were made in an attempt to broaden assessment to encompass elements of student performance as well as student knowledge. The paper points to the importance of self-assessment as the principal method by which quality control is achieved in the legal profession. I describe how the School of Law has tried to develop the ability of students to assess their own performance as well as that of their peers as a prelude to the kind of assessment that should take place in the profession. I also describe how the School uses outside assessors (practicing attorneys and others) to achieve its goals, and I offer an example of a multidimensional assessment exercise. Finally, I suggest ways in which changes in our assessment of student performance have favorably changed the learning environment.

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Assessment for Learning in Legal Education

John O. Mudd
Dean, University of Montana School of Law

The last twenty years have been an era of intense critique of law schools both from within the schools themselves and from the legal profession. So far rhetoric has far outpaced reform, but there have been significant developments at a few law schools including our own. In this paper I will describe some of those developments as they relate to the central matter of assessing student performance.

The University of Montana School of Law is small and has enjoyed both the benefits and burdens of a strong, but quite traditional program of study. (A more complete description of the school is provided as Appendix A.) Our academic planning project began in 1979 and received early support from the Fund for the Improvement of Post-Secondary Education. The goal throughout the project has been to improve the preparation of our students for the kind of professional activity in which most of them will engage. That goal has taken us in two programmatic directions simultaneously: enlarging our students' understanding of the theoretical side of the law while at the same time developing their proficiency in the practical skills needed to be an effective lawyer.

The blending of theory and practice, knowing and doing has been our goal. Working toward it has required a significant modification of traditional educational structure and methods in certain areas, particularly in our assessment of student performance.

The first step in our project was to determine the abilities lawyers in our region need to perform effectively. Working with consultants as well as our own instructional designer who was with us for four years, we prepared a questionnaire which elicited from practicing attorneys their judgment about the level of skill needed to perform effectively as lawyers as well as the level of skill they observed in beginning lawyers. The instrument was sent to all Montana lawyers and we received responses from about one-third of the practicing bar. (A year later the same study was conducted of Idaho lawyers. That study generated results which, although not identical to Montana's, were parallel and reinforced our initial conclusions.)

The data collected in these studies suggest the relative importance of certain abilities in lawyering as well as the level of ability possessed by new lawyers. What we gained was a general picture, painted with a broad brush, of what the good lawyer should be able to do as well as what she should know. This information serves as the frame of reference for our ongoing efforts to integrate knowing and doing in our academic program.

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In reviewing the role of assessment in our program the first point to be made is the importance of self-assessment in professional life. How assessment occurs in the legal profession in large measure determines the quality of the legal services delivered to the public. Assessment within the practicing bar takes place in three ways.

First--and unfortunately often last--there is assessment in connection with disciplinary proceedings. It is used rarely, only in extreme cases, and has little impact on the overall quality of the profession.

Second, within law firms lawyers sometimes receive constructive critique from their colleagues. But this form of peer assessment is about as widespread and effective in law as it is among professors in higher education.

Ultimately the only form of ongoing assessment in the profession is that which the individual lawyer conducts of his or her own performance. Clients can't do it; they lack the expertise. Colleagues won't do it out of embarrassment or a sense of impropriety. The formal structures of the profession don't do it; they barely keep up with serious incompetence. The only significant force for monitoring the day-to-day quality of legal services is the individual lawyer and that lawyer's self-assessment ability. Consequently, the skill of self-assessment deserves the attention of legal education, not only to improve learning within law school, but as an indispensible skill needed by lawyers in practice.

We are working toward three goals for assessment:

(1) To design methods of assessing student performance that are sufficiently broad to encompass the full range of professional performance for which we are preparing students, not just the single dimension of cognitive ability.

(2) To develop in our students the skills and attitudes needed to conduct peer assessment.

(3) To provide our students with a sufficient perspective and capacity for honest self-reflection so that they can assess their own performance accurately.

We discovered first hand, although it is fundamental, that you cannot teach for performance yet continue to evaluate students on only one element of performance, namely, knowledge of the subject matter. The assessment procedure in many ways drives the educational process, at least when the students are very pragmatic and time-conscious as law students tend to be. As a teacher I might tell my students that several elements are needed for effective professional performance, but my telling will not affect their learning if I evaluate them on only one element. Yet at the law school we were not prepared for assessing a full range of professional abilities. Even after we developed clearer notions of what we wanted in the way of demonstrated abilities, we did not have the internal resources to assess them in each student.

We came quickly and happily to the conclusion that careful

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involvement of outside assessors is invaluable for a number of educational and practical reasons. First, without them assessment in the way we wish to achieve it is impossible. Moreover, outside assessors, particularly practicing lawyers and other professionals complement the skills of our full-time faculty. It is both educationally sound and a good motivational experience to have our students encounter early in their studies real lawyers who stress the importance of certain skills (like effective writing) and do so with more credibility than a law professor ever could. Finally, the relationships we have developed with our lawyer and non-lawyer assessors have had a positive public relations effect. We now "employ" (although at very modest cost) over fifty outside assessors. This number does not count an equal number of individuals who volunteer to help us with several programs like judging moot court exercises.

We have also learned about the importance of good training for assessors. Presently our training varies depending on the exercise being assessed. For example, the non-lawyers who assess students in our interviewing program are given a full day's training each year. The students who manage our law firm program undergo three days of training each fall including one day of work on principles of small group interaction directed by the head of our university's clinical psychology program. The training must not only encompass the goals of the program, the methods and instruments used, but also how to provide students with appropriate feedback for their level of development. The latter is particularly important when using professionals to assess the performance of beginning students because we have found that the expectations of professionals can be unrealistic for these new students.

Inter-rater reliability is an important factor in assessor preparation as well as a potential problem. We have made progress on establishing acceptable levels of inter-rater reliability, but have concluded that any system of multiple assessors must expect and plan for an acceptable degree of variance. This becomes particularly important when the assessment is one of the factors of a student's final grade.

After expanding both our knowledge of performance assessment and our experience with it, this fall we took the formal step of establishing an assessment center at the law school. The center is as much a concept as a place. The concept stresses the importance of assessment; the place facilitates the implementation performance assessment. The center complements our traditional methods of evaluating student performance, and has been offered to faculty as a resource to assist them, not a new administrative requirement. Initially our center has been responsible for the coordination of all non-academic assessment, i.e., assessment which relates more to doing rather than knowing. The center is responsible for coordinating the logistics of an assessment program which now involves 225 students and over 100 paid and volunteer external assessors.

In addition, the center serves as a repository for the

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written assessments of student performance. These do not replace traditional grades which we still maintain in a conventional way, but we hope the assessments will serve as a complement to the grades, particularly as we educate prospective employers, students, and ourselves about using another source of important information about individual student's performance.

Each student has an assessment file that includes written work, evaluations of simulated and live-client clinical experiences and a video tape on which we record all students' oral presentations over their three years of study . We see this repository as a beginning for gathering much more complete information on each student, both for the student's sake and for our own. It is at least strange that professional schools attempt to represent several years of multifaceted education on a 3 x 5 card containing the bare letters, A, B, and C. More is needed to provide students, faculty, and prospective employers with an accurate appraisal of student abilities, strengths and weaknesses.

Appendix B contains sample documents we use to assess student performance in their first trial exercise. The first three pages are taken from an eleven-page judge's guide that makes clear to our outside assessors what level of performance we expect from the students in the exercise and provides detailed standards on which to assess the students. There follows a three-page evaluation form that is completed by the assessor and given to the course instructor and the student.

A few matters regarding this exercise deserve highlighting. The exercise is structured to integrate several elements of writing, knowledge of trial procedure, and oral advocacy. It is a multi-dimensional exercise and involves multiple assessment with separate assessors addressing the writing and trial portions. All students receive individual feedback from the assessors at the conclusion of the exercise. In addition, the trial portion is videotaped so that the students can develop their skills of self assessment. Because this is the students' first trial experience, care is taken to distinguish the level of performance expected of them in this exercise from that which will be expected in the more advanced trial exercise they will take part in when they are in their final year of study.

We have found that this kind multiple assessment of student performance promotes learning in a variety of ways. Students appreciate early that their professional education is more than memorizing a body of facts or rules. They understand the greater challenge of integrating that information into effective professional conduct and technique. They begin to see themselves as professionals, rather than merely students, when they interview simulated clients, work in their student law firms, prepare legal documents, and try cases. Moreover, because their assessment takes these factors into account, they know that we take the exercises seriously, so they do too.

Through performance assessment the students gain a broader perspective on the profession, particularly that it deals with

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people and complex situations, not just books. They begin to understand that professional activity is not as tidy as academic activity, and they learn they must be able to manage "messes" if they want to be lawyers.

By stressing performance in a variety of settings, the more conventional textbook learning can be placed in a context so that students appreciate its importance more fully. Developing performance skills and receiving feedback through assessment builds confidence in the student's ability to handle real professional activity. As students become more comfortable with professional roles, their motivation increases. The information overload which is sometimes encountered with pure academic learning fades when students develop at the same time skills of doing. By taking part in simulated activity even before students have made a detailed study of a particular area (e.g. trying simple cases before they have studied the law of evidence), students create a frame of reference for the later study and a greater appreciation for its relevance. They also gain a greater sense of integration with their expectations: they came to law school to learn to be lawyers so they appreciate doing what lawyers do and being evaluated on their performance of lawyer tasks--not just more advanced student tasks.

In the last six years we have only begun to understand the impact of assessment on the teaching and learning environment. Two things are clear. If a faculty intends to broaden the scope of its educational program beyond the dissemination of knowledge, it must also broaden the scope of its evaluation of students. Secondly, if we tell students that certain abilities or skills other than mere knowledge are important, but that is not reflected in our testing, the students, particularly the bright ones who find their way to graduate school, will quickly learn that we don't mean what we say and they will orient their learning to our testing, however broad or narrow that may be.

None of our efforts at the law school has been revolutionary. Indeed, we began by building on several forms of assessment--like moot court--that have been used by law schools for some time. Most of our work simply involves the application of established cognitive and educational theory. What is unusual, at least in legal education, is the extent to which we have taken that theory seriously.

The chief way we are able to measure our own success as educators and the way the students measure theirs is through assessment. Certainly such an important component of the educational enterprise deserves more attention than at least those of us in legal education have given it is the past. Our experience is that the more attention that is given to assessment, the greater the positive effect on teaching and learning.

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JUDGE'S GUIDE TO STANDARDS OF TRIAL PERFORMANCE IN PEARSON v. CITY OF UTOPIA

During the trial of *Pearson v. City of Utopia*, one student will deliver the opening statement and his or her partner will deliver the closing argument. Each student will conduct a direct examination of one witness and a cross-examination of another. As you can see from the attached grading sheet, each student may receive up to six points for the opening or closing, six points for direct examination, six points for cross-examination, five points for "style", including two for courtroom decorum and three for speaking ability, and two "bonus" points for introduction and use of exhibits and handling of objections.

Experience has shown that a very elaborate evaluation form such as is used in the senior jury trial is inappropriate for first year students. The distinct skills required for each of these phases of a civil trial are numerous. We do not expect students to have mastered them after necessarily cursory training. Even if they had, their first brief trial exercise will not afford them an opportunity to demonstrate mastery of each element.

In addition, it is very difficult for the evaluator to simultaneously act as judge, listen attentively to the testimony, and fill out an evaluation form which purports to rate the students on ten or fifteen different aspects of a successful argument, direct or cross-examination. The evaluation form has therefore been kept as simple as possible.

Nonetheless, students are entitled to know what we consider to be the elements of a successful opening, witness examination, and closing, and it is to be hoped that judges will bear these standards in mind when awarding points. Therefore the outline of such elements for each phase of the trial which has been given to each trial team, is attached. Such outline is drawn largely from T.A. Mauet, FUNDAMENTALS OF TRIAL TECHNIQUES (1980). Mauet's book has been recommended to the students, and is on reserve. Judges, too, are encouraged to look it over.

In addition, for the convenience of the judges, we have included an outline of the principal factual points to be elicited on cross-examination of each witness. This should not, of course, be shared with the students, although a copy will be made available after all the trials are completed.

OPENING STATEMENT

I. Purposes of the opening statement.

A. Setting the scene for the jury.

1. Keep confusing details to a minimum, especially compass directions.

2. Use charts, with the judge's permission, if they have been stipulated to.

B. Developing your theory of the case.

1. The facts which you present should all fit into a coherent account of the occurrence.

2. They should also relate to the basis of your client's liability or nonliability.

II. Manner of presentation.

A. State the facts specifically and in reasonable detail.

1. Be objective--save argument for your closing.

2. Avoid continual repetition of the phrase "We believe the evidence will show. . ." or the like.

B. Use understatement--let the factfinder discover that your case is even stronger than you let on at first.

C. Call your client by name, while calling his opponent "the defendant, the corporation, the city" etc.

D. Discuss weaknesses in your case where necessary, but in the least damaging way.

III. Remember that the opening statement in *Pearson* is being delivered to a judge. There is no jury.

A. Judges don't need elaborate introductions to the trial process, their role in it, the concept of comparative negligence, etc.

B. Judges are also intolerant of jury rhetoric and courtroom theatrics directed to an audience of one.

DIRECT EXAMINATION

I. Purposes of direct examination.

A. Tell a story.

B. Establish the witness's credibility.

1. What is the witness's background?

2. Is his story plausible?

simply ask predetermined questions.

C. Don't argue with the witness.

D. Exercise control over the witness:

1. Use leading questions only--never ask "Why did you do that?" or the like.

2. Don't allow him to explain, argue or inject irrelevancies.

3. Refuse to let the witness get away with a non-responsive answer.

4. Move to strike the testimony or admonish the witness when necessary.

5. Stop when you have elicited your major points.

a. Avoid asking one question too many which allows the witness to recoup.

POINTS TO WATCH FOR IN THE CROSS-EXAMINATION OF INDIVIDUAL WITNESSES

To assist you in evaluating the students' cross-examinations in their trial of *Pearson v. City of Utopia*, and in particular in commenting on them after the trial, herewith an outline of points we expect to see elicited in the cross-examination of each of the four witnesses.

As with the other outlines of the elements of a successful cross-examination, we do not expect you to use this as a check-list. You may, however, wish to look it over quickly when the cross-examination has been completed, noting any major omissions for review with the student.

CROSS-EXAMINATION OF WANDA PEARSON (by defendant)

1. She was out at a party until at least 1:30 AM the night before the accident, and was at work at 7:30 AM. The accident took place after she had already been minding the kids for six hours.

2. At the party Wanda had a serious fight with her boyfriend of two years, which led to their breaking up. She must have been upset and preoccupied the next day.

3. Wanda understood that, in accordance with both pool rules and common sense, the children should have been under her eye at all times while they were actually in the water. Nonetheless she stood up and left the edge of the pool while talking with Missy Fairchild.

EVALUATION FORM FOR PEARSON v. CITY OF UTOPIA

Please note that the student's performance on opening statements, direct and cross-examinations, and closing arguments is to be evaluated first for substance and then for manner. For guidance as to what we expect, particularly as to manner, see your "Judge's Guide to Standards of Trial Performance in *Pearson v. City of Utopia*."

Student's Name: _____

Representing: _____(plaintiff or defendant)

OPENING STATEMENT (if applicable)

1. Was the statement a substantively adequate review of the facts necessary to make out (or defeat) plaintiff's causes of action?

Unsatisfactory	Satisfactory	Excellent
One point	Two points	Three points

2. Was the statement well-organized, clearly presented, and easy to follow?

Unsatisfactory	Satisfactory	Excellent
One point	Two points	Three points

DIRECT EXAMINATION

Name of witness: _____

3. Did the examiner elicit all the facts for which he or she called the witness?

Unsatisfactory	Satisfactory	Excellent
One point	Two points	Three points

4. Was the examination well-organized, easy to follow and technically competent?

Unsatisfactory	Satisfactory	Excellent
One point	Two points	Three points

CROSS-EXAMINATION

Name of witness: _____

5. Did the examiner elicit all facts tending to undermine the opponent's case and cast doubt upon the witness's credibility?

Unsatisfactory	Satisfactory	Excellent
One point	Two points	Three points

6. Did the examiner successfully control the witness?

Unsatisfactory	Satisfactory	Excellent
One point	Two points	Three points

CLOSING ARGUMENT (if applicable)

7. Was the argument a substantively adequate review of the law and the evidence in the light most favorable to the client?

Unsatisfactory	Satisfactory	Excellent
One point	Two points	Three points

8. Was the argument well-organized and persuasive?

Unsatisfactory	Satisfactory	Excellent
One point	Two points	Three points

COURTROOM DECORUM

9. Did the student attorney conform to the rules of courtroom decorum?

Unsatisfactory	Satisfactory
One point	Two points